**BRITISH AMERCIAN LIFE & GENERAL INSURANCE BERHAD**

**v.**

**PEMBINAAN FAL BHD. & 3 ORS.**

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. D2-22-247-1991]
9 JUNE 1994

***PRACTICE & PROCEDURE: Order 14 RHC - Application for summary judgment - Objections raised - Failure to depose belief that there is no defence to the claim in affidavit in support as required by O. 14 r. 2(1) RHC - Whether statement superfluous or unnecessary - Whether defect cured by a supplementary affidavit - Application made after defence filed - Whether explanation for the delay acceptable.***

The plaintiff filed an action on 14 February 1991 and on 15 May 1991 appearance was entered for the defendants. On 29 May 1991, judgment in default of defence was entered against the defendants which was set aside on 24 February 1992 upon the defendants' application. By that time the defendants had filed their defences. On 15 May 1992 the learned Judge indicated that pursuant to O. 56 r. 2 of the Rules of the High Court 1980 (RHC) no further argument was required and on 22 March 1993 the plaintiff applied for summary judgment under O. 14 of the RHC. The defendants objected to the application on two grounds; firstly, that the plaintiff had failed to depose in its affidavit in support its belief that there was no defence to the claim as required by O. 14 r. 2(1) of the RHC and secondly, that there was delay in making the application, that is; only after the defences were filed.

In relation to the first objection, plaintiff's Counsel cited authority which held that the words "and I verily believe there is no defence to this action" were superfluous and unnecessary. Counsel further submitted that even assuming that the original affidavit was defective the defect was cured by the supplementary affidavit filed. In relation to the second objection, defendants' Counsel cited the Supreme Court case of *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134 and submitted that an explanation for the delay in filing this application acceptable to the Court was required. In reply the plaintiff 's Counsel submitted that this application was distinguishable from the matter before the Supreme Court because an explanation for the delay was given.

**Held:**

**[1]** When summary judgment is sought under O. 14 its requirements must be strictly complied with and the supporting affidavit must state the plaintiff's belief as required by r. 2(1) and Form 18 referred to therein and there is no question of such a statement being superflous or unnecessary. However the defect in the original affidavit can be cured by a supplementary affidavit. That was what was in fact done in this case and accordingly there was no merit in the first ground.

**[2]** The Court did not accept the explanation given for the delay. At least from 15 May 1992 when the learned Judge indicated that no further argument was required the plaintiff should have vigorously applied itself to filing the O. 14 summons but the plaintiff did not do so until 22 March 1993. The explanation for the delay was that the plaintiff's former solicitors had moved from Kuala Lumpur to Kota Bharu and it was only in October that the plaintiff “agreed” to change to solicitors practising in Kuala

Lumpur. No reason was forthcoming as to why it took the plaintiff so long to change its solicitors. It then took the plaintiff's solicitors, both past and present a leisurely 4 months in exchanging correspondence to pass the necessary documents and cause papers. Having made available a quick remedy to a plaintiff, it was not unreasonable for the Court to require that party to seek the remedy with alacrity. It was a question of acting within a few weeks if not days and not months on end as the plaintiff in this case did.

*[Application dismissed with costs to be taxed].*

**Cases referred to:**
*Sandilands Buttery & Co. Ltd. v. Marcus Knorpel [1959] 3 MC 244* ***(foll)***
*Tan Tik Sing v. Gomez Development Co. Sdn. Bhd. [1979] 2 MLJ 78* ***(foll)***
*Dreyfus, etc v. Clarke [1958] 1 All ER 459* ***(cit)***
*Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. [1986] 2 MLJ 134, [1986] 1 CLJ 541* ***(refd)***
*First Malaysia Finance Bhd. v. Yeow Bon Chong (Civil Suit No. C 7956 of 1985, High Court Kuala Lumpur)* ***(overruled)***
*Tractors Malaysia Berhad v. Joseph Thambirajah & Anor. [1986] 2 CLJ 72* ***(overruled)***
*Symon & Co. v. Palmer's Stores (1903) Limited [1912] 1 KB 259* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 14, r. 2(1) Form 18, O. 56 r. 2

**Other sources referred to:**
**Mallal's Digest, (1991)**
**Supreme Court Practice 1993,** Vol. 1, paras 14/2/4, 14/2/8

*For the plaintiff - Davinder Kaur; T/n. Dass, Jainab & Associates*
*For the defendants - Halim Kasim; T/n. Syarikat Radhakrishnan*

**JUDGMENT**

**Richard Talalla J:**
The plaintiff has made an application for summary judgment under O. 14 of the Rules of the High Court 1980. The defendants object to the application on two grounds firstly that the plaintiff is in breach of r. 2(1) of the said Order in that in the affidavit in support there is no deposition to belief that there is no defence to the claim or at all. In answer Counsel for the plaintiff cited *Sandilands Buttery & Co. Ltd. v. Marcus Knorpel* [1959] 3 MC 244 where in a similar application the affidavit in support contained a number of defects including an omission to depose to belief as abovestated and it was held that reading the affidavit as a whole the words 'and I verily believe there is no defence to this action' were superfluous and unnecessary and that even assuming that the original affidavit was defective that defect was cured by the supplementary affidavit. With respect when summary judgment is sought under O. 14 its requirements must be strictly complied with and the supporting affidavit must state the plaintiff's belief as required by r. 2(1) and Form 18 referred to therein and there is no question of such a statement being superfluous or unnecessary. As stated in the **Supreme Court Practice 1993,** volume 1, paragraph 14/2/8 this statement is an essential part of the affidavit. See also the judgment of Ajaib Singh J. (as he then was) in *Tan Tik Sing v. Gomez Development Co. Sdn. Bhd.* [1979] 2 MLJ 78 which I respectfully follow. I do however agree that the defect in the original affidavit can be cured by a supplementary affidavit and in this regard the *Sandiland's* case abovestated is followed. See also the said **Supreme Court Practice** paragraph 14/2/4 and *Dreyfus, etc v. Clarke* [1958] 1 All ER 459. That is what was in fact done in this case and accordingly I am of the view that there is no merit in the first ground of objection.

As to the second ground, the following is a chronology of events. On 14 February 1991 the writ of summons and statement of claim were filed. On 15 May 1991 an appearance was entered for the defendants. On 29 May 1991 judgment in default of defence was entered under circumstances that came to be questioned. On 9 October 1991 the plaintiff made written demand of the defendants for payment of the judgment debt. On 25 October 1991 the 4th defendant and on 24 February 1992 the other defendants applied to have the default judgment set aside and their applications were allowed by the learned Judge with costs to be in the cause which suggested that there was merit in questioning the entry of the judgment. Defences by all the defendants had been filed. By 15 May 1992 the learned Judge had indicated pursuant to O. 56 r. 2 that no further argument was required. There was no appeal.

Against this background of events Counsel for the defendants cited the Supreme Court case of *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134 where at page 135 it is stated as follows:

> ... the law as to the time when an application for an O. 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the Court no O. 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum* [1890] 24 QBD 504. This case was followed by Raja Azlan Shah J. (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98 and Abdoolcader J. (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

Counsel for the plaintiff countered with the decision of Siti Norma Yaakob J. in *First Malaysia Finance Bhd. v. Yeow Bon Chong* Civil Suit No. C 7956 of 1985 High Court Kuala Lumpur digested in **(1991) Mallal's Digest,** where it was held that "delay, *per se*, is only one of the factors to be considered in an O. 14 application but on its own, it can never form the basis of dismissal of such an application and that in that case, there had been other interlocutory steps taken by D during the period of delay and this, coupled with the fact that no prejudice had been shown to have been done to D as a result of the delay, could not form the basis of striking out P's appeal based on delay alone;". Also *Tractors Malaysia Berhad v. Joseph Thambirajah & Anor.* [1986] 2 CLJ 72 at page 76 where Dr. Zakaria J. stated that the Court had power to enter summary judgment against the defendant even though a defence had been filed and the plaintiff took some time to file the O. 14 application. With respect the last two decisions would appear to have been given before judgment in the Supreme Court case abovestated was delivered and in any event must be taken to be overruled by the said judgment. For my part I am bound by the Supreme Court's decision and I follow it.

Counsel for the plaintiff then submitted that this application is distinguishable from the matter before the Supreme Court because here an explanation was indeed given. I do not accept the explanation. At least from 15 May 1992 when the learned Judge indicated that no further argument was required, the plaintiff should have vigorously applied itself to filing the O. 14 summons.

The plaintiff did not do so till 22 March 1993. The explanation for the delay was that the plaintiff's former solicitors had moved from Kuala Lumpur to Kota Bharu, Kelantan; when it was not stated. It was only in October 1992 that the plaintiff "agreed" to change its legal representation to solicitors practising in Kuala Lumpur. No reason was forthcoming as to why it took the plaintiff so long to change its solicitors. It then took

the plaintiff's solicitors, both past and present, a leisurely 4 months in exchanging correspondence relative to the present solicitors obtaining from the former the necessary documents and cause papers.

As stated by Vaughan Williams LJ in *Symon & Co. v. Palmer's Stores (1903) Limited* [1912] 1 KB 259 at page 264, O. 14 is a "salutary provision for the purpose of preventing a defendant, who knows perfectly well that he owes the sum claimed, from postponing the time of payment, and putting the plaintiff to further expense in a litigation which ought never to have taken place;." The Court having made available a quick remedy to a plaintiff, it is not unreasonable to require that party to seek the remedy with alacrity. A prudent plaintiff represented by a competent solicitor, seeking to take advantage of the O. 14 procedure will be ready to file the summons hot on the heels of the defendant entering appearance and certainly within the period prescribed for service of the defence, at least so as to avoid the embarrassment of having to explain delay as required by the *Krishnamurthy* decision aforesaid. It is a question of acting within a few weeks if not days and not months on end as the plaintiff in this case did. The application is dismissed with costs to be taxed. I do not require further argument. A certificate is to issue if required.